Netherlands national report

Gribnau, J.L.M.; Pauwels, M.R.T.

Published in:
Retroactivity of tax legislation

Publication date:
2013

Document Version
Publisher's PDF, also known as Version of record

3.13. Netherlands

Hans Gribnau and Melvin Pauwels

3.13.1. Terminology

3.13.1.1. Distinction between retroactivity and retrospectivity

Until the PhD dissertation of the Dutch legal scholar Hijmans van den Bergh[1] in 1928, in the Netherlands discourse the concept of 'retroactivity' was linked with the doctrine of 'acquired rights' or 'vested rights'. Basically, the opinion was that a statute could be characterized as retroactive if acquired rights were infringed. Hijmans van den Bergh stated, however, that a distinction should be made between retroactive effect, exclusive effect (nowadays usually called immediate effect) and grandfathering. The advantage of this approach is that the characterization of the temporal effect of a statute is not confused with the appraisal of the temporal effect. The approach taken by Hijmans van den Bergh has generally been accepted in the Netherlands legal discourse, although some minor adjustments have been made over the course of time.

Recently, the various concepts in transitional tax law have been analysed and summarized in two PhD dissertations.[2] The conclusions of both scholars are *grosso modo* the same. They argue that, on the one hand, there are transitional rules that determine the temporal effect of the statute concerned: retroactive effect, immediate effect and delayed effect, and that, on the other hand, transitional rules may make it possible for certain existing situations to be grandfathered. Furthermore, they argue that the issue of transitional law with respect to a statute should be distinguished from the date of entry into force of that statute. The moment of entry of force marks the moment as from which the statute becomes *valid* and thus can be applied. However, to which events and to which periods the statute may then – after the entry of force – be applied depends on the transitional rules (and obviously the *ratione materiae* of the statute concerned).

Most of the time the temporal effect of a statute (*ratione temporis*) can be derived from the transitional rule in that statute, namely by means of comparing the 'effective entrance date' that the statute mentions, with the 'date of entry into force' of the statute (which latter date should be – as required by Article 81 of the Constitution[3] – on or after the date of publication of the statute in the official gazette). So, if the effective entrance date is set prior to the date of entry into force, the statute has retroactive effect; if the effective date is the same as the date of entry into force, the statute has immediate effect; and if the effective date is set on a date after the date of entry of force, the statute has delayed effect. The retro-

1. L.J. Hijmans van den Bergh, *Opeenvolgen van rechtsregels* (PhD dissertation Utrecht, 1928).
2. M.R.T. Pauwels, *Terugwerkende kracht van belastingwetgeving: gewikt en gewogen* (Retroactivity of tax legislation: weighing and balancing) (Amersfoort: Sdu Uitgevers, 2009) and M. Schuver-Bravenboer, *Fiscaal Overgangsbeleid* (Deventer: Kluwer, 2009).
3. See with respect to this provision also section 3.13.2.1.

active effect just mentioned is called 'formal retroactivity' (*formeel terugwerkende kracht*), to be distinguished from 'material retroactivity' (see below).

Please note that the above also implies that – unlike in some other countries – one speaks also of (formal) retroactive effect in case a statute enters into force at a certain moment in a tax year and is applicable as from the beginning of that year. So, unlike for example Germany, the Netherlands prevailing opinion does not use a tax period-related concept of retroactivity, but uses a taxable event-related concept of retroactivity.

As stated above, besides the transitional rules that determine the temporal effect, there are transitional rules that may make it possible that certain existing situations are grandfathered. Existing situations may partly be grandfathered, but also temporarily; these two 'options' may be chosen for one and the same existing situation. The question whether or not to grandfather not only arises when the statute has immediate effect but also when the statute has retroactive effect or has delayed effect.

If a new statute has immediate effect and existing situations are not grandfathered, the literature refers to the effect of the statute on those existing situations as 'material retroactivity' (*materieel terugwerkende kracht*). See with respect to this term also section 3.13.1.6 below.

Note that in Dutch legal language only one term (namely *terugwerkende kracht*), instead of two, is used but that an adjective (*formeel* (formal) and *materieel* (material)) is added to that term to make a distinction that corresponds to the two kinds of retroactivity for which in English two terms are used ('retroactive' and 'retrospective').

It can be concluded that in the Netherlands a distinction is made that corresponds to the distinction between retroactive and retrospective to which the questionnaire refers. The Netherlands makes a distinction between formal retroactivity and material retroactivity.

3.13.1.2. **Relevance of tax period**

As discussed in section 3.13.1.1, the Netherlands prevailing opinion does not use a tax period-related concept of retroactivity, but uses a taxable event-related concept of retroactivity.

3.13.1.3. **Interpretative statutes**

The conceptual variations that are mentioned in questions (2)-(4), i.e. interpretative statutes and validation statutes, are not commonly known in Dutch legal discourse.

It is true that the Netherlands legislator sometimes introduces a tax statute with retroactive effect and states that the statute only provides an interpretation (i.e., only clarifies the meaning) of another statute, but in the Netherlands legal system this phenomenon is not given a label, i.e. 'interpretative statute'.

3.13.1.4. **Validation statutes**

As stated above, the concept of 'validation statute' is not commonly known in Dutch legal discourse.

Thus, although it sometimes happens that the Netherlands tax legislator introduces a statute with retroactive effect to confirm a legislative practice or to 'overrule' a judicial decision that deviates from legislative practice (or only from the view of the Netherlands tax authorities), the phenomenon 'validation statute' is not recognized as such.

3.13.1.5. **Comparison moment**

As can be derived from section 3.13.1.1, the prevailing opinion in the Netherlands commonly uses the date of entry into force as the 'comparison moment'.

3.13.1.6. **Concept of retrospectivity**

The concept of retrospectivity that is used in the questionnaire has a corresponding concept in Dutch tax discourse. This concept is the above-mentioned concept of 'material retroactivity' (*materieel terugwerkende kracht*). The concept of 'material retroactivity' is, however, not well-defined in Netherlands legal (tax) discourse. Nonetheless, with respect to some events, the Netherlands prevailing opinion would agree to use the term 'materially retroactive'. For example, suppose an income tax statute enters into force on 1 January 2010, and provides that a certain tax exemption is repealed as from that date without grandfathering accrued but unrealized gains. As a result, gains that accrued prior to 1 January 2010 and that are realized after that date would not be tax exempt, although they accrued in a period when the exemption applied. Because of this result, such a statute would be called 'materially retroactive'.

3.13.1.7. **Distinction between substantive and procedural statutes**

The distinction between substantive statutes and procedural statutes mentioned in question 7 is also made in Netherlands legal practice. Hence, a new procedural statute having immediate effect is directly applicable, also to legal proceedings regarding taxable years before the moment of entry into force. For example, the Netherlands legislator made an amendment to the existing rules regarding additional assessments in 1994, which amendment held that imposing an additional assessment would be possible in the case of 'bad faith' of the taxpayer. This change was applicable to all additional assessments imposed after the entry into force, thus also to those regarding years prior to 1994.[4]

The consequences of the immediate effect of the introduction (or change) of rules regarding evidence or the burden of proof, as a matter principle depend on whether such a rule is incorporated in a procedural rule or in a substantive rule. If such a rule is incorporated in a substantive rule (e.g., 'cost of maintenance of real estate is only deductible when there are documents that can prove the maintenance') while before the legislative change the proof did not necessarily have to be provided by documents, the immediate effect of the change would generally imply that the change is only applicable to costs made after the moment of entry of force – which usually is the beginning of the next tax year. If, however, a rule of evidence or the burden of proof is incorporated in a procedural rule (e.g., the rule that in case a taxpayer has filed a tax return that is substantially incorrect, the taxpayer bears the burden of proof that the assessment imposed by the tax authorities is not correct), the immediate effect of the change would be that the change is applicable to all assessments imposed after the entry of force of the rule, thus also to assessments regarding previous tax years.

3.13.2. *Ex ante* evaluation of retroactivity

3.13.2.1. **Constitutional limitations to retroactivity of tax statutes**[5]

The Constitution contains a provision that prohibits retroactivity of criminal statutes (Article 16: 'No fact is regarded as criminal than by force of a *preceding* criminal statute'; *italics*

4. Compare Supreme Court 12 May 1999, No. 34 347, BNB 1999/258, and Supreme Court 11 June 1997, No. 32 299, BNB 1997/384.
5. See in detail M.R.T. Pauwels, 'Retroactivity of Tax Legislation; Constitutional, Judicial and Self-regulatory Limitations in Netherlands Law', in: Billur Yalti (ed.), *Retroactivity in Tax Law,* Koc University Istanbul Tax Conference Series 1, (Istanbul: Koc University Publications, 2011).

supplied). The Constitution does contain the principle of legality with regard to taxes,[6] but that provision does not explicitly impose limitations on the retroactivity of tax statutes. Furthermore, the Constitution does not contain a provision in which the principle of legal certainty (or the principle of ability to pay) is laid down either.

One might think at first sight that a ban on retroactivity is implicitly laid down in Article 88 of the Constitution. That article provides that a statute does not enter into force before the statute is published (in the official gazette). However, as mentioned above (section 3.13.1.1/ 3.13.1.2/ 3.13.1.5) it is important to make a distinction between the (moment of) entry of force of a statute and its temporal field of application. The moment of entry of force marks the moment from which the statute becomes *valid* and thus can be applied. That application, as from that moment, might also include the periods or events prior to the moment of entry of force.[7] Thus, where the legislator grants retroactive effect to a statute, it does not violate Article 88 of the Constitution.

There is an old act (the General Provisions Act (*Wet Algemene Bepalingen*)) of which Article 4 provides: 'A statute only binds for the future and has no retroactive effect.' However, according to case law of the Supreme Court this provision is not addressed to the legislator but only to the court – which may not grant retroactive effect to a statute unless the legislator has provided so.[8]

Notwithstanding the above, in Dutch legal discourse it is generally accepted that the principle of legal certainty and of legitimate expectations are general legal principles.[9] These principles are 'unwritten' constitutional norms. These principles *normatively* restrict[10] the legislator in its possibilities to grant retroactive effect. The latter is not altered by the fact that (see section 3.13.4.1 below) there is a constitutional prohibition for the courts to test acts of parliament for compatibility with general legal principles (unless such a principle is incorporated in a binding international treaty).

3.13.2.2. **Transition policy of government**

As mentioned in the explanation to this question, the Netherlands State Secretary of Finance has published – and discussed with parliament – a memorandum on transition policy.[11] The State Secretary plays a leading role in the enacting of tax legislation, so it is his task to establish a general policy.[12] This memorandum sets out the main lines of his 'transitional policy' with respect to the introduction of tax statutes. The memorandum is not legally binding, but it is influential in the parliamentary debate, for example, in the event

6. Article 104 of the Constitution: 'State taxes are imposed by force of a statute.'
7. Depending on whether or not the legislator provided retroactive effect to the statute.
8. E.g., Supreme Court No. 16 452, 13 January 1971, BNB 1971/44.
9. Compare e.g. Supreme Court No. 26 974, 7 October 1992, BNB 1993/4.
10. 'Restrict'; hence, not an absolute prohibition.
11. In the Netherlands the enactment of a statute (act of parliament) is not solely a task of parliament, but it is a task of parliament and government together (Article 81 of the Netherlands Constitution). The government is constituted by the King and the Ministers (Article 42 of the Constitution). In cases in which the Minister regards it as appropriate, the State Secretary can replace the Minister (Article 46 of the Constitution). Statutes are signed by the King and one or more Ministers or State Secretaries (Article 47 of the Constitution).
12. The State Secretary of Finance introduces most of the tax bills. He is also head of the tax administration, and as such is politically responsible for its functioning. Unlike some other countries, he is not part of the civil service. See on the key role of the State Secretary of Finance in Netherlands tax law, Hans Gribnau, 'Separation of Powers in Taxation: The Quest for Balance in the Netherlands', in: Ana Paula Dourado (ed.), *Separation of Powers in Tax Law*, EATLP International Tax Series vol. 7 (Amsterdam: International Bureau of Fiscal Documentation, 2010) and Richard Happé and Melvin Pauwels, 'Balancing of Powers in Dutch Tax Law: General Overview and Recent Developments', in: Chris Evans, Judith Freedman and Richard Krever (eds.), *The Delicate Balance. Tax, Discretion and the Rule of Law* (Amsterdam: International Bureau of Fiscal Documentation, 2011), at pp. 223-254.

that a bill includes retroactive effect. The State Secretary and parliament discuss the temporal effects of the bill in terms of this memorandum. Furthermore, lower courts and advocates-general to the Supreme Court sometimes refer to the memorandum when testing transitional rules of a statute for compatibility with Article 1 First Protocol ECHR. Also, in the tax literature the memorandum is used to discuss the fairness of the transitional rules included in a bill.

The status of the memorandum is not entirely clear. When discussing the memorandum with parliament, the Netherlands State Secretary of Finance ended the discussion by stating that the advice of the Council of State with respect to retroactivity[13] would be the guideline in the future. In practice, however, the lines of the memorandum still seemed to be used by the State Secretary when drawing up tax bills.[14] In December 2009, upon request of member of the Senate, the State Secretary however again confirmed that he agrees with the view of the Council of State. Time will tell whether the State Secretary indeed follows the criteria laid down in the view of the Council of State.

The memorandum sets out as the starting points of tax transitional policy that in principle no retroactive effect will be granted to statutes and that statutes in principle will have immediate effect (without grandfathering). The memorandum consists of two parts. The first deals with (formal) retroactivity. The second part deals with immediate effect and grandfathering (thus, also with issue of material retroactivity (retrospectivity)).

The memorandum is especially focussed on changes in legislation that are disadvantageous for taxpayers. It pays no attention to the topic of granting retroactive effect to tax statutes that are favourable to taxpayers.

In the first part of the memorandum it is stated that the question whether or not retroactivity is justified is a matter of balancing of interests: on the one hand, legal certainty of the individual taxpayers concerned and, on the other hand, the interest of the society as a whole that are served by granting retroactive effect to the statute concerned. Whether or not retroactivity in a concrete case is justified cannot be answered in general but depends on the circumstances of the case. However, two elements can be distinguished. The first element is called the 'substantive element': whether or not a justification exists for granting retroactive effect. The second element is called the 'timing element', which element refers to the period of retroactivity.

With respect to the 'substantive element' the memorandum mentions several relevant circumstances and factors that could justify retroactivity and/or that should be taken into account. In brief, these are:

- The new statute targets abuse or improper use of tax rules;
- There is an obvious omission in the existing legislation;
- Announcement effects would occur after publication of the bill if no retroactive effect is granted;
- The government's budgetary interest;
- Practical aspects regarding the implementation and execution of the tax legislation by the tax authorities.

With respect to the 'timing element' the memorandum states that the retroactive effect should in principle not reach further back in time than the moment at which the taxpayers have been informed about the intention to introduce a new statute. This latter moment is, e.g., the moment at which a bill is submitted to parliament or the moment at which a press release is issued in which the intention of introducing a new statute with retroactive effect is announced. However, retroactivity could also be justified in case the amendment concerned is 'otherwise' foreseeable, e.g. in the case of an obvious omission.

---

13. See section 3.13.2.3 for this view.
14. Pauwels, *supra* note 2, section A.3.3.

Furthermore, if there are very weighty arguments, the retroactive effect could even reach further back in time than the moment on which the regulation concerned was foreseeable for taxpayers. According to the memorandum, such arguments could be very big budgetary interests of the government or avoiding a small group of taxpayers from getting an unintended and unjustified advantage.

The second part of the memorandum points out that the question whether a statute should have immediate effect (without grandfathering) or should provide for grandfathering, is (also) a case of the balancing of interests. These interests are the legitimate expectations of the taxpayers and the interest that is served by the statute concerned. In comparison with the first part (regarding retroactivity), the second part gives less guidance with respect to the circumstances and factors that should be taken into account when balancing the interests concerned.[15] It is a pity in particular that little attention is given to the question when expectations raised by the existing law can be considered 'legitimate'. Furthermore, it would have been helpful if the memorandum had provided examples of situations in which grandfathering is considered appropriate. Most of the examples provided refer to situations in which grandfathering is not regarded as appropriate (according to the memorandum), which is obviously less informative as it is in line with the transition's starting point of immediate effect without grandfathering.

3.13.2.3. **Ex ante control by an independent body**

The Netherlands Council of State (*Raad van State*) advises the Netherlands government and parliament on legislation and governance and is the country's highest administrative court.[16] Like the House of Representatives and the Senate, which together form the States General (parliament), the Netherlands Court of Audit and the National Ombudsman, the Council of State is one of the High Councils of State. These are bodies regulated by the Constitution, each with its own specific task, which it carries out independently of the government. The Council of State provides government and parliament with independent advice on legislative proposals, i.e. bills submitted to parliament by the government.[17] In one of its advices with respect to a concrete legislative proposal, the Council of State has formulated its general criteria for examining tax transitional law.

With respect to (formal) retroactivity the Council of State says that only in the event of 'exceptional circumstances' is it allowed to grant retroactive effect to statutes that are disadvantageous[18] to taxpayers. Such exceptional circumstances could be present in the case of *considerable* announcement effects or in the case of *large-scale* tax abuse or improper use of tax rules. Please note that these requirements are stricter than those mentioned in the State Secretary's memorandum: only two circumstances are mentioned and those two are more restrictive (see the adjectives in italics). Also with respect to the period of retroactivity (the 'timing element' in the memorandum) the Council of State is stricter than the State Secretary. According to the Council, retroactivity is in any case not allowed if the regulations concerned were not sufficiently known to taxpayers at the point in time to which the retroactive effect reaches back.

---

15. The memorandum mentions factors that are relatively abstract, such as the nature of the new regulations, the nature of the old regulations, the degree of reality of the expectations, the extent of the breach with the old law by the new regulations, whether the change of the statutes was foreseeable, and whether positions taken up under, and relying on, the old law can be changed.
16. The basis for its responsibilities can be found in Articles 73-75 of the Netherlands Constitution.
17. After a bill – together with the accompanying Explanatory Memorandum – is discussed in the Council of Ministers, it goes – together with the authorization of the King – to the Council of State for advice; see Article 73 of the Netherlands Constitution and Article 15 of the Council of State Act (*Wet op de Raad van State*).
18. The advice of the Council of State does not deal with the retroactivity of favourable tax statutes.

With respect to the question of grandfathering or not, the remarks of the Council of State with respect to 'material retroactivity' (retrospectivity) are relevant. These remarks were made in an advice regarding a legislative proposal that provided that the new statute would also be applicable to existing agreements. The Council of State remarked that in case a statute has 'material retroactive effect' a balancing of interests is necessary: on the one hand, the interest of grandfathering existing agreements and, on the other hand, the financial interest of the government. The Council notes that a relevant circumstance to be taken into account is whether the taxpayers could rely on the fact that the transactions concerned were in line with aim and purpose of the law, and apart from that were not considered undesirable.

As far as we are aware, the Council of State has not indicated any general criteria for assessing favourable retroactivity.

3.13.3. Use of retroactivity in legislative practice

3.13.3.1. Legislating by press release

The Netherlands legislator occasionally makes use of the instrument of 'legislating by press release'. Please note that this instrument is in fact mentioned in the above-mentioned (see section 3.13.2.2) memorandum of the State Secretary where the 'timing element' is elaborated on. It is, however, certainly not the case that the instrument is used very often.

There are *grosso modo* three types of situations in which the instrument is used. The first is that the new statute is aimed at (existing or expected) abuse or improper use of tax rules. Without an announcement that retroactive effect will be granted to the moment of the announcement of the legislative proposal, it is feared that an announcement effect would take place, i.e. that taxpayers would just quickly make use of the loophole between the moment of announcement and the introduction of the new statute. An example of such a situation in which the instrument of 'legislation by press release' is used, can be found in the *Stichting Goed Wonen II* case of the ECJ (C-376/02). Advocate-General Tizzano was very critical with respect to the instrument[19] and concluded that the retroactivity concerned was contrary to the principle of legal certainty. The ECJ, however, did not condemn the use of the instrument in general terms, but ruled – amongst other things – that the Netherlands court should assess whether the press releases concerned were sufficiently clear to enable taxpayers to understand the consequences of the legislative proposal regarding the transactions. Eventually, the Netherlands court ruled that this was the case.[20]

The second type of situation is that an existing favourable tax policy rule (for example, a fiscal subsidy) is changed or withdrawn. In order to avoid announcement effects and negative consequences for the government's budget the Netherlands legislator sometimes considers it necessary to grant retroactive effect to the change (or, as the case may be, the withdrawal) till the moment of the public announcement of the change and its retroactive effect. An example is the withdrawal of the personal-computer facility (which facility made it possible for an employer to grant a (wage and income) tax-free allowance to an employee

19. Paragraph 38 reads: 'It is true that (…) the practice in some Member States is to give forewarning of legislative measures by means of press releases intended to apprise those affected by the legislation in due time. It appears to me, all other considerations aside, that such a practice cannot be extended to the context of a common market encompassing all European economic operators, in which the practice normally followed is inspired by the principle that the behaviour of citizens is guided and regulated by laws rather than by press releases. Indeed, as the Commission has rightly pointed out, the existence of a particular practice in a must not lead to a situation throughout the Community in which citizens in general and taxpayers in particular are called on to rely more on announcements in the press than on the law in force.'
20. Supreme Court No. 34 514, 14 December 2007, BNB 2008/37.

for the acquisition of a computer). This facility was withdrawn with retroactive effect to the moment at which the press release announcing the intention of withdrawal with retroactive effect was issued. The Netherlands Supreme Court ruled that this retroactive effect did not violate Article 1 of the First Protocol ECHR.[21]

The third type of situation concerns the situation in which the Supreme Court has given a judgment that is considered undesirable by the government. The legislator may then amend the statute involved. Sometimes, the legislator then grants retroactive effect to the amendment, often with the purpose of avoiding announcement effects. An example concerns the legislative amendment of the Personal Income Tax Act further to a judgment of the Supreme Court with respect to the exit tax on pensions when a person emigrates. The Supreme Court held, in short, that the exit tax was a 'treaty override' under the old tax treaty with Belgium. The legislator reacted to this judgment by amending some technicalities of the exit tax, with retroactive effect to the date of the press release announcing the amendment. Please note with respect to this third type of situation that the legislator sometimes even grants retroactive effect that goes further back in time than the first announcement; see section 3.13.3.2.

3.13.3.2. **Retroactive effect further back than first announcement**

It only very incidentally happens that retroactivity goes further back than the moment at which the change and its retroactive effect was announced. There are, however, three types of situations in which this sometimes happens.

The first type is a rather specific one. The situation arose after to the major and fundamental amendment of the personal income tax system in 2001, namely the replacement of the Personal Income Tax Act (PITA) 1964 by the PITA 2001. After the introduction of the PITA 2001, it appeared that this act contained several, mostly technical, errors and omissions. Therefore, the State Secretary submitted bills to repair the errors and omissions with retroactive effect reaching back to the moment of entry into force of the PITA 2001, i.e., further back in time than the moment at which the repair was announced. In its advice the Council of State agreed to the retroactive effect because it thought that errors and omissions are reasonably unavoidable in the case of such a major tax revision. However, according to the Council of State, the repair amendments that are granted retroactive effect should be minor amendments and should be reasonably expected by the taxpayers. Eventually, parliament also agreed with the retroactive effect of several of the proposed amendments.

A second type of situation is when legislation contains obvious omissions and errors. Repairing with retroactive effect till the moment the omission or error arose not only happens in the case of incorrect cross-references etc., but sometimes also in the case of substantial errors, e.g. if an amendment has the unintended result that a certain item of income is no longer taxable.

A third type of situation is that new legislation is introduced further to a judgment of the Supreme Court. In case the legislator considers the judgment undesirable, e.g. because the judgment exposes a loophole in the existing legislation and/or because of the drastic negative consequences of the (*erga omnes* effect of the) judgment for the government's budget, the legislator sometimes grants retroactive effect to the legislation that 'overrules'[22] the judgment. However, parliament is sometimes critical when the State Secretary

21. Supreme Court No. 07/10481 and 07/13624, 2 October 2009, BNB 2011/47.
22. Please note that it is not a genuine overruling, because it is usually provided that the new legislation does not affect the case in the judgment of the Supreme Court. It is an 'overruling' in the sense that the interpretation of a statute (or the rule provided) by the Supreme Court is overruled by the legislator.

submits a bill to overrule a judgment of the Supreme Court. The result may be that the State Secretary withdraws the bill or amends the bill limiting the retroactivity.

3.13.3.3. **Pending legal proceedings**

Because most of the cases of retroactivity of legislation concern the above-mentioned (see section 3.13.3.1) phenomenon of 'legislating by press release' (and therefore the period of retroactivity is limited to the moment of announcement of the amendment concerned), the retroactive effect normally does not have the effect that pending legal proceedings are influenced.

Especially, in cases in which the period of retroactivity reaches further back in time than the moment of announcement (see in this respect section 3.13.3.2), it could in theory happen that the new statute (with retroactive effect) has an influence on pending legal proceedings before the courts.[23] There are, however, no clear examples of this in the case law of the Supreme Court.

There is one example of a situation in which the tax authorities took a position in a lower court proceeding that was contrary to existing case law of the Supreme Court but in line with a bill (which included an amendment with retroactive effect) that still had to be submitted to parliament. The court ruled at a time when the bill had still not been submitted (let alone enacted by parliament) and held in favour of the taxpayer. In addition, the court condemned the tax authorities to pay the taxpayer's full legal costs because of 'abuse of the legal proceedings'.[24] In this situation, however, the statute was not in force yet and as such could not influence the outcome of the legal proceedings.

If an amendment is introduced with a far-reaching retroactive effect to 'overrule' a decision of the Supreme Court (see section 3.13.3.2), the legislator usually provides that the new statute is not applicable to the case of the taxpayer who pursued the proceedings that led to the decision concerned of the Supreme Court. This may be done in the bill but it is also possible that the State Secretary of Finance explicitly confirms this during the parliamentary proceedings.[25]

3.13.3.4. **Favourable retroactivity**

The Netherlands legislator sometimes grants retroactive effect to tax statutes that are favourable to taxpayers. It is difficult to say in which types of situations this happens, because most of the time there is little debate in parliament if favourable retroactivity is proposed by the State Secretary of Finance in a bill. Furthermore, the above-mentioned general memorandum of the State Secretary of Finance gives no attention to this topic. Moreover, in the Netherlands tax literature there is little debate and little research with respect to this issue of favourable retroactivity.[26]

Nonetheless, it seems that *if* favourable retroactivity is granted, it occurs most of the time in situations in which the field of application *ratione materiae* of a provision has a different scope than expected and intended. E.g., in the case of a favourable provision (such as a tax exemption or a tax subsidy): a certain type of situation does not fall in the field of

---

23. Note that the above statements hold for (retroactivity of) substantive statutes. Obviously, new procedural statutes are as a matter of principle also applicable to pending legal proceedings, as this is the general transitional rule with respect to procedural statutes (see section 3.13.1.7).
24. Court of Appeals of s-Hertogenbosch No. 00/2803, 16 July 2003, V-N 2003/36.5.
25. Pauwels, *supra* note 2, at pp. 315-317.
26. The main exception in the recent literature is the article by M. Bravenboer and A.O. Lubbers, 'Tijd voor uitbreiding van de Notitie terugwerkende kracht en eerbiedigende werking', *Weekblad voor fiscaal recht* (2005), at pp. 964 970.

application *ratione materiae* of that statute, while it was expected or intended that it would ('under-inclusiveness'). E.g., in the case of an 'unfavourable' provision (such as a provision that imposes a tax liability or that denies a tax deduction): a certain type of situation does fall within the field of application *ratione materiae* of that statute, while it was neither expected nor intended that it would ('over-inclusiveness'). The key factor is whether or not the field of application *ratione materiae* of the provision goes against the expectations and/or intentions with respect that field. For example, when the former Article 12 of the Netherlands CITA (which was a kind of anti-abuse rule) was withdrawn there was a lot of discussion as to whether the withdrawal should have retroactive effect, amongst other things because the provision had been highly criticized from the start. At the end, parliament decided that retroactive effect was not appropriate, amongst other things, because the arguments *pro* withdrawal with retroactive effect were not new arguments, but were arguments that had already been considered when introducing the provision.[27] In other words, it was not the case that the field of application was different from that originally expected and intended. Another example: when the Supreme Court unexpectedly ruled that cable networks should be regarded as immovable property (and not as movable property as was the assumption in practice) and therefore real estate tax was due when transferring cable networks, the legislator amended the Real Estate Tax Act, introducing an exemption for transfer of cable networks. This amendment entered into force on 1 January 2006 and was granted retroactive effect till 6 June 2003, being the date of the decision of the Supreme Court.

Finally, please note that granting retroactive effect is not the only instrument that the government has in case it considers a certain (non-)application of a provision that is disadvantageous for taxpayers to be undesirable. The same result can de facto be reached in case the tax authorities issue an 'approving' tax policy rule. In such a policy rule it is then stated that the tax authorities will apply the provision concerned in an advantageous way in the situations for which the (non-)application of the provision concerned is considered undesirable.

3.13.4. *Ex post* evaluation of retroactivity (in case law)

3.13.4.1. Testing against the Constitution and legal principles[28]

In Netherlands law, the courts are not allowed to test acts of parliament for compatibility with the Constitution, because of a constitutional prohibition to do so (Article 120 of the Constitution). Because of this constitutional prohibition the Netherlands Supreme Court held that it is allowed neither to test acts of parliament for compatibility with general legal principles that are not laid down in the Constitution.

There are exceptions with respect to the latter. The courts are permitted to test an act of parliament for compatibility with a general legal principle in case the principle concerned is incorporated in a provision of an international treaty that has direct effect. Hence, courts may examine acts of parliament for compatibility with the principle of equality as incorporated in Article 14 ECHR and in Article 1 of the Twelfth Protocol ECHR[29] (while they

27. See e.g., the arguments of the Member of the Upper Chamber (and tax law professor at the University of Tilburg) Essers in Handelingen I (*Parliamentary Proceedings of the Upper Chamber*), 29 November 2005, No. 357, p. 8, regarding bill No. 29686.
28. See also Pauwels, *supra* note 5.
29. See for an overview of the Netherlands case law in that respect, e.g., J.L.M. Gribnau and R.H. Happé, 'Equality and Tax Law: a Matter of Principle', in: *L'année fiscale: Revue annuelle* (Paris: Presses Universitaires de France, 2005), at pp. 127-143, and C.A.T. Peters, Dutch Branch Report, in: L. Hinnekens & P. Hinnekens (eds.), *Non-discrimination at the Crossroads of International Taxation*, Cahiers de droit fiscal international, 93a (Amersfoort: Sdu Fiscale & Financiële Uitgevers, 2008), at pp. 407-426.

cannot test for compatibility with the principle of equality laid down in the Netherlands Constitution). With respect to the issue of retroactivity and retrospectivity Article 1 of the First Protocol ECHR is particularly important; see section 3.13.4.3.

A second exception is that if an act of parliament falls within the scope of European Union law, the retroactivity of such an act can be tested against the general principles of European Union law,[30] e.g., the protection of legitimate expectations and legal certainty. Therefore, retroactivity as well as retrospectivity of national VAT legislation may be tested against these general principles of EU law. An important example for the Netherlands legislative practice is the *Stichting Goed Wonen II* case (C-376/02), in which the phenomenon of 'legislating by press release' was at discussion (see section 3.13.3.1).

In contrast to acts of parliament, the courts *are* allowed to examine subordinate legislation (i.e. not acts of parliament; thus, e.g., local legislation) for compatibility with legal principles, even if these principles are 'unwritten'. Therefore, the courts do examine the retroactivity of subordinate legislation for compatibility with the principle of legal certainty.

3.13.4.2. **Examination method**

Not applicable. There is no testing against the Constitution in the Netherlands; see section 3.13.4.1.

3.13.4.3. **Testing against Article 1 of the First Protocol ECHR**

As mentioned, the Netherlands courts are not allowed to test retroactivity of an act of parliament for compatibility with the 'unwritten' principle of legal certainty (unless EU law is applicable, in which case the act can be tested against the European law principles of legal certainty and protection of legitimate expectations). Therefore, taxpayers can only request courts to test the (formal and/or material) retroactivity concerned for compatibility with Article 1 of the First Protocol ECHR. In addition, since taxpayers (or at least their advisers) have become more familiar with the possibility to make an appeal to Article 1 of the First Protocol ECHR in court, there is a growing number of cases in which the courts have to rule on the compatibility of retroactivity with that provision.

However, until now the Netherlands Supreme Court has never held (formal and/or material) retroactivity of an act of parliament to be contrary to Article 1 of the First Protocol ECHR.[31] When testing retroactivity the Supreme Court often bases its analysis on the grounds of the ECHR in the *M.A.* case.[32] The reasons that the Netherlands Supreme Court had never found retroactivity in concrete case incompatible with Article 1 of the First Protocol ECHR are that, on the one hand, the ECtHR has ruled that 'a Contracting State, not least when framing and implementing policies in the area of taxation, enjoys a wide margin of appreciation' and that the legislator's assessment is accepted unless it 'is devoid of reason-

30. The answer to the question when exactly an Act can be tested for compatibility against a general principle of Community law appears to not yet be very clear. See for a view S. Douma, 'The Principle of Legal Certainty: Enforcing International Norms uUnder Community Law', in: S. Douma and F. Engelen (eds.), *The Legal Status of OECD Commentaries* (Amsterdam: IBFD, 2008), at pp. 217-249.
31. See Pauwels, *supra* note 2, section D with an overview of the case law. Please note that there is one decision of a lower court – the Court of Appeals of The Hague July 21, No. 04/03463, V-N 2007/2.10 – in which retroactivity of a statute was declared incompatible with Article 1 of the First Protocol ECHR. This decision has been discussed by Hans Pijl, 'Netherlands Tax Law Meets Human Rights Law', *European Taxation* 2006, at pp. 453-456. The tax authorities decided not to appeal this decision before the Netherlands Supreme Court, although they did not agree with the grounds of the decision.
32. ECtHR No. 27793/95, 10 June 2003, (decision), *M.A. and 34 Others against Finland.*

able foundation',[33] and, on the other hand, the Netherlands legislator has, according to the Supreme Court, not exceeded that margin in the cases in which the Supreme Court had to decide.

Note that the ECtHR is stricter towards retroactivity in the situation the retroactivity has a decisive influence on pending legal proceedings. For such a situation the ECtHR has ruled that 'the principle of the rule of law and the notion of fair trial (…) preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute.' This rule originates from case law with respect to the application of Article 6 ECHR (which provision is not applicable to pure tax cases[34]).[35] However, this rule is now also applied in the sphere of Article 1 of the First Protocol ECHR, to tax cases as well.[36] In this respect it is important that mere budgetary reasons are not accepted as 'compelling grounds of the general interest'.[37]

3.13.4.4. **Examination method for testing against principle of legal certainty**

The Netherlands courts can test retroactivity of subordinate legislation (i.e. legislation not from the national parliament, but e.g. local legislation) against the principle of legal certainty.

The Supreme Court refers to 'the legal principle based on the requirements of legal certainty that legislative measures should only apply for the future.' The Supreme Court has ruled that deviation from this principle in disadvantage for taxpayers is only justified in case of 'special circumstances.'[38] It is, however, not yet entirely clear which circumstances could qualify as special circumstances. It is clear though that 'foreseeable' could qualify as such a special circumstance. So, in case the taxation, for which the retroactive rule provides, was foreseeable for taxpayers, the retroactivity could be justified.[39] Please note that the Supreme Court has never ruled in a concrete case that the formal retroactivity at stake was incompatible with the principle of legal certainty; in most cases the taxation was considered foreseeable for the taxpayer involved.

The courts are not only permitted to test formal retroactivity but also material retroactivity (i.e. the case of not providing for a grandfathering provision) for compatibility with the principle of legal certainty. The Supreme Court has noted that 'for the principle of legal certainty (…) also respecting legitimate expectations is important.'[40] However, the courts seem to be reluctant to accept the existence of legitimate expectations; a change of the tax rate is, for example, not considered to violate the principle of legal certainty.[41] There is only one case in which the Supreme Court ruled that legitimate expectations were violated by

33. ECtHR No. 27793/95, 10 June 2003, (decision), *M.A. and 34 Others against Finland*. See also ECtHR, No. 21319/93, 23 October 1997 21449/93 and 21675/93, *National & Provincial Building Society c.s.*, paragraph 80.
34. ECtHR July 12, 2001, No. 44759/98 (Grand Chamber), *Ferrazzini against Italy*.
35. E.g. ECtHR October 23, 1997, No. 21319/93, 21449/93 and 21675/93, *National & Provincial Building Society c.s.* and ECtHR Nos. 24846/94 and 34165/96 to 34173/96 (Grand Chamber), 28 October 1999, *Zielinski and Pradal and Gonzalez and Others v. France*.
36. ECtHR No. 30345/05, 23 July 2009, *Joubert against France*.
37. ECtHR No. 30345/05, 23 July 2009, *Joubert against France*.
38. E.g., Supreme Court No. 22 456, 24October 1984, BNB 1985/59, and Supreme Court No. 43 936, 24 April 2009, BNB 2009/158.
39. E.g. Supreme Court No. 22 456, 24 October 1984, BNB 1985/59, and Supreme Court No. 43 936, 24 April 2009, BNB 2009/158.
40. Supreme Court No. 26 974, 7 October 1992, BNB 1993/4.
41. E.g. Supreme Court No. 31 920, 7 May 1997, BNB 1997/211.

the immediate effect (without grandfathering) of an amendment.[42] That case concerned a municipal tax that was to be paid for the granting of a licence by the local authorities. The tax regulations provided for an exemption for certain licences. This exemption was withdrawn at a certain moment, without, however, providing for grandfathering licences for which the application was already filed, not even for the licences for which the application was filed prior to the moment that the intention to withdraw the exemption was announced by the local legislator. The Supreme Court ruled that the exemption still applied to the latter licences, because of the principle of honouring legitimate expectations.

3.13.4.5. **Interpretations by courts to avoid retroactivity**

There are no clear indications that the courts use interpretations that avoid what might be retroactive applications. The determination of the courts whether a statute has retroactive effect and whether the retroactive effect of a statute also applies to the case at hand does not seem to be handled differently from cases in which the field of application *ratione materiae* of a statute has to be determined. Similar to these cases, the common interpretation methods are used by the courts when there are questions of transitional law. Thus, it may happen that according to the wording of the provision and its transitional provision a certain case would fall under the retroactive effect of the provision, but that the court nonetheless decides otherwise because parliamentary history shows that the retroactive effect is meant for a different type of situation than one at hand.[43] Conversely, even if a statute does not explicitly provide for its retroactivity, it is possible that the court reaches the conclusion, e.g. on the basis of the purpose of the statute and/or the history of its enactment, that that statute has retroactive effect.[44] Notwithstanding the previous remark(s), as the starting point is that statutes do normally not have retroactive effect, the courts do not easily assume that a statute has retroactive effect in case there is no indication in the statute itself that this is the case.

3.13.4.6. **Reasons for lack of judicial limits to retroactivity**

As can be inferred from the answers to the previous questions, the Netherlands courts set only few limits on the use of retroactivity of acts of parliament. The main reason is that, as mentioned above (see section 3.13.4.1), the courts have few possibilities to test retroactivity of acts of parliament because of constitutional constraints. In principle, they can only test it for compatibility with Article 1 of the First Protocol ECHR (unless EU law is applicable, in which case the retroactivity can also be tested for compatibility with the EU principle of legal certainty), which possibility does not, however, provide serious latitude for the courts, because of the ECHR's doctrine of 'wide margin of appreciation'.

Subordinate legislators seem to be disciplined with respect to the use of retroactivity. As shown above, the Supreme Court has never found the (formal) retroactive effect of a subordinate statute incompatible with the principle of legal certainty (see section 3.13.4.4). The reason may well be that the draftsmen of subordinate tax legislation (e.g. the local authorities such as the municipality) are relatively self-disciplined.

---

42. Supreme Court No. 26 974 7 October 1992, BNB 1993/4.
43. Supreme Court No. 39 617, 3 February 2006, BNB 2007/70.
44. Supreme Court No. 19 017, 7 March 1979, BNB 1979/125.

3.13.5. **Retroactivity of case law**

First of all, it should be noted that, perhaps unlike the courts of some other countries, the Netherlands Supreme Court more or less explicitly makes clear whether a certain consideration in its judgment has an *erga omnes* effect, i.e. is a general rule.[45]

If the Netherlands Supreme Court deviates from a rule that it laid down in an earlier judgment, it nowadays tends to do that explicitly. Furthermore, most of the times the Court explains why it deviates from existing case law. In case the new rule is unfavourable to taxpayers (compared to the old rule), the Court sometimes provides for a transitional rule. This latter seems even to be standard practice in the field of case law on the concept of 'sound business practice' (*goed koopmansgebruik*) to determine the annual profit of an enterprise. For example, when the Supreme Court rules that a certain type of earnings should be taken into account as taxable income at an earlier time than it would have been according to previous case law[46], the Court often provides for this in a transitional rule.[47] Such a transitional rule usually states that the new rule is only applicable to situations that arise after a certain future date. Such a rule, therefore, contains in fact two elements of transitional law. First of all, the new rule has delayed effect – i.e. the rule is applicable as from a date in the future; also called 'prospective overruling'. The second element is that situations, for example contractual obligations, that exist at that future date, are grandfathered; so, even after the future date, not the new rule but the old rule applies to those situations. If the Supreme Court provides for such a transitional rule, it usually justifies this decision by referring to the taxpayers' legitimate expectations based on the old case law.

However, in case the Supreme Court abandons existing case law and provides for a new rule that is favourable to taxpayers (and therefore unfavourable to the government's budget), the Supreme Court does not usually provide for a transitional rule. This means that the new rule is directly applicable and has in fact retroactive effect (thus, in favour of taxpayers). Sometimes, such a ruling provokes a reaction from the State Secretary of Finance, i.e. he submits a bill containing retroactive effect to 'overrule' the retroactive *erga omnes* effect of the Court's judgment in order to avoid negative budgetary consequences (see also section 3.13.3.2).[48]

3.13.6. **Views in the literature**

3.13.6.1. **Opinions regarding retroactivity**

In the literature there does not seem to be a *communis opinio* with respect to the question when retroactivity of tax legislation is justified. However, the view that retroactive legislation that is disadvantageous to taxpayers is never justified or only in extreme circumstances is losing ground. E.g., the line of two recent PhD dissertations[49] is *grosso modo* that the question whether retroactivity is permitted cannot be answered *in abstracto* but should be answered by balancing the interests concerned and by taking into account the circum-

---

45. See on the issue of how to find out whether a judgment of the Netherlands Supreme Court contains a general rule A.O. Lubbers, *Belastingarresten lezen en analyseren* (Amersfoort: Sdu Fiscale & Financiële Uitgevers, 2007).
46. Or that a certain type of expenses can only be taken into account as tax-deductible costs at a later moment than it could have been according to previous case law.
47. See e.g., Supreme Court November 13, 1991, No. 27 563, BNB 1992/109, Supreme Court December 18, 1991, No. 26 674, BNB 1992/181 and Supreme Court June 28, 2000, No. 34 169, BNB 2000/275. See also an article of one of the judges of the Netherlands Supreme Court, J.W. van den Berge., 'Fiscaal overgangsbeleid van de rechter', in: A.O. Lubbers (ed.), *Opstellen fiscaal overgangsbeleid* (Kluwer: Deventer, 2005), at pp. 35-46.
48. See for examples Pauwels, *supra* note 2, section 11.17.4.
49. Pauwels, *supra* note 2 and Schuver-Bravenboer, *supra* note 2.

stances of the legislative case. More in general, in the Netherlands literature it seems to be accepted that retroactive effect may be granted to anti-abuse rules if there is a fear of announcement effects, provided that the period of retroactivity effect is limited to the moment of the announcement and that the announcement is sufficiently clear.

Nevertheless, the general opinion in the Netherlands literature seems to be that there should be weighty arguments to justify retroactivity of tax legislation, also in case the period of retroactivity is limited to the moment of the announcement of the bill (the phenomenon of 'legislating by press release'). The latter is remarkable as it seems that in some other countries it is quite common that legislation is granted retroactive effect until the moment of the announcement of the bill.[50] Therefore, it seems that the appreciation of retroactivity partly depends on the legal culture of a country.

3.13.6.2. **Debate on law and economics view on transitional law**

The law and economics view on transitional tax law has provoked very little debate in Dutch legal discourse. E.g., in parliamentary debate no typical law and economics arguments have been used. Also in the literature there is little attention for the law and economics view.

If attention is given to this issue in the literature, most of the time it is noted that some elements of the view are interesting and have added value (e.g. attention to the behavioural effects of transition policy – such as the fact that standard practice that also in the case of anti-abuse legislation retroactivity does not go beyond the date of announcement, has the effect that there is no incentive for taxpayers not to look for loopholes as the period until the announcement will not be affected –, and the notion that grandfathering could have the (negative) effect that some taxpayers get a 'windfall gain').[51] But the view itself usually gains little support because of the strong utilitarian approach of law, in which there is little attention for fairness arguments and e.g. the intrinsic legal value of legal certainty.

50. See e.g. G.T. Loomer, 'Taxing Out of Time: Parliamentary Supremacy and Retroactive Tax Legislation', *British Tax Review* 2006, p. 68, and A. Harper, 'Tax Post Facto', *British Tax Review* 2006, p. 395 with respect to the UK and Canada.
51. See Pauwels, *supra* note 2, section 7.3.